UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOSE LUIS ZURITA, MARIA ANA YAX TAX, and MACARIA PEREZ HERNANDEZ,

Plaintiffs,

-against-

HIGH DEFINITION FITNESS CENTER, INC., INDIVIDUAL REALTY, INC., CREATIVE 38, INC., EKINDRA GURCHARRAN, and GEWAN CRIPRIANA, a/k/a GEEWAN CRIPRIANA, a/k/a GEWAN CIPRIANI, a/k/a MIKE CIPRIANI,

Defendants.
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REPORT AND
RECOMMENDATION
13 CV 4394 (CBA)(RML)

LEVY, United States Magistrate Judge:

Plaintiff Jose Luis Zurita ("Zurita") brought this wage and hour action on behalf of himself and similarly situated employees on August 5, 2013, against defendants High Definition Fitness Center, Inc., Individual Realty, Inc., Creative 38, Inc., Ekindra Gurcharran, and Gewan Cripriana, a/k/a Geewan Cripriana, a/k/a Gewan Cipriani, a/k/a Mike Cipriani ("Cipriani") (collectively, "defendants"). (See Complaint, dated Aug. 5, 2013.) On December 9, 2013, plaintiffs Zurita and Maria Ana Yax Tax ("Tax") filed a motion for default judgment (Notice of Motion, dated Dec. 9, 2013), which the Honorable Carol Bagley Amon, United States District Judge, referred to me for a Report and Recommendation. (Order, dated Dec. 20, 2013.) After defendants appeared at a damages hearing, plaintiffs agreed to withdraw the motion, and shortly thereafter filed an amended complaint. (See Minute Entry, dated Jan. 27, 2014; Amended Complaint, dated Jan. 29, 2014 ("Am. Compl.") (adding Maria Ana Yax Tax and Macaria Perez Hernandez ("Hernandez") as named plaintiffs).) However, defendants' participation proved to be close to negligible.[1] (See Order, dated Mar. 24, 2015 (describing, inter alia, defendants' non-compliance with an Order to Show Cause, failure to obtain counsel for the corporations, and failure to satisfy the terms of settlement agreement).) Significantly, defendants never answered or otherwise moved with respect to the amended complaint. In this context, plaintiffs renew the motion for default judgment. (See Letter of Peter Cooper, Esq., dated Aug. 12, 2015.)

For the reasons stated below, I respectfully recommend that the Clerk of the Court be directed to enter a notation of defendants' default, and that plaintiffs' motion be granted. With regard to damages, I recommend that plaintiff Zurita be awarded $45,309.97, as well as pre-judgment interest at a rate of nine percent per annum on his compensatory damages of $28,637.11, accruing from July 10, 2010 to the date that judgment is entered. As to plaintiff Tax, I recommend an award of $198,477.27, and pre-judgment interest at a rate of nine percent per annum on her compensatory damages of $128,875.45, accruing from July 10, 2010 to the date that judgment is entered. As to plaintiff Hernandez, I recommend an award of $51,008.75, and pre-judgment interest at a rate of nine percent per annum on her compensatory damages of $31,158.50, accruing from November 17, 2010 to the date that judgment is entered. Finally, I respectfully recommend that plaintiffs be awarded post-judgment interest, and that they be jointly awarded $15,555 in attorney's fees and $581 in costs.

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[1] I note that defendants' former counsel played a role in delaying the litigation, and she was sanctioned. (See Order, dated Mar. 24, 2015.) I also note that defendants have not communicated with the court in any capacity since March 3, 2015, despite explicit warnings that further non-compliance would result in a recommendation of default judgment. (See Response, dated Mar. 3, 2015.)

PERTINENT FACTS

The court assumes familiarity with the facts concerning defendants' intermittent participation, pervasive non-compliance, and default. (See Order, dated Mar. 24, 2015.) The following facts are drawn from allegations in the amended complaint, as well as uncontested evidence in the hearing record.[2]

Defendants Cipriani and Ekindra Gurcharran (the "Individual Defendants") own and operate defendants High Definition Fitness Center, Inc., Individual Realty, Inc., and Creative 38, Inc. (the "Corporate Defendants").[3] (Am. Compl. ¶¶ 70-71.) Defendants' businesses are a costume manufacturing factory, an event space, and a gym. (Id. ¶ 53.) These are located on separate floors of a property at 3038 Atlantic Avenue, Brooklyn, New York. (Id. ¶¶ 32-33.) In addition to common ownership and management, the Corporate Defendants "shared Plaintiffs, acted in the interest of each other with respect to employees, paid their employees by the same method, [and] shared control over the employees." (Id. ¶ 53.)

Zurita was employed by defendants from 2002 to mid-2013. (Transcript of Oct. 20, 2015 Damages Hearing ("Hr'g Tr.") at 20.) His job was to pack boxes with costumes and to clean the gym and event space. (Id.) He worked for ten hours each day, six days a week. (Id.) He took a thirty-minute lunch break each day. (Id. at 22.) Throughout his employment, Zurita received a weekly salary of $371. (Id. at 21.)

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[2] I deem the factual allegations in the amended complaint true as a result of defendants' default. See Gunawan v. Sake Sushi Rest., 897 F. Supp. 2d 76, 80 (E.D.N.Y. 2012). I also note that the court held a damages hearing on October 20, 2015. (See Minute Entry, dated Oct. 20, 2015.)

[3] Defendant Creative 38, Inc. "is not a licensed corporation and [] is actually doing business under one of the other corporate defendants." (Am. Compl. ¶ 57.)

Tax was employed by defendants from 2002 to June 2013 as a seamstress. (Id. at 24.) She worked for eleven hours each day, seven days a week, taking a thirty-minute lunch break each day. (Id. at 26.) Tax was paid at a per-piece rate. (Id.) Her average weekly wages were $271. (Id. at 29.)

Hernandez was employed by defendants from 2002 to December 20, 2013 as a seamstress. (Id. at 8.) She worked five days each week for approximately thirty hours. (Id. at 9.) Her pay varied because she was paid at a per-piece rate. (Id. at 9-10.) Her average weekly wages were $120. (Id.) Finally, each plaintiff was paid in cash and never received accurate documentation as to hours worked and rate of pay. (Am. Compl. ¶¶ 63, 65.)

DISCUSSION

A. Legal Standard

A party's default "is deemed to constitute a concession of all well pleaded allegations of liability. . . ." Greyhound Exhibitgroup v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (E.D.N.Y. 1992) (citation omitted). Nevertheless, "it remains the plaintiff's burden to demonstrate that those uncontroverted allegations . . . establish the defendant's liability on each asserted cause of action." Gunawan v. Sake Sushi Rest., 897 F. Supp. 2d 76, 83 (E.D.N.Y. 2012) (collecting cases). A party's default "is not considered an admission of damages." Greyhound, 973 F.2d at 158 (citations omitted). "If the defaulted complaint suffices to establish liability, the court must conduct an inquiry sufficient to establish damages to a 'reasonable certainty."' Gunawan, 897 F. Supp. 2d at 83 (quoting Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999)). In this inquiry, plaintiffs are entitled to all reasonable inferences from the evidence they offer. See Jemine v. Dennis, 901 F. Supp. 2d 365, 373 (E.D.N.Y. 2012).

B. Liability

Plaintiffs assert claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq., and the New York Labor Law ("NYLL"). (See Am. Compl. ¶¶ 73-95.) Plaintiffs allege, inter alia, that defendants failed to pay them minimum wages, overtime compensation, and spread-of-hours premiums. (Id.) Plaintiffs further allege that defendants did not provide them with "any document or written statement accurately accounting for their actual hours worked, and setting forth their hourly rate of pay, regular wage, and/or overtime wages." (Id. ¶ 63.)

1. Joint Employers

The FLSA defines an "employer" broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The "economic reality" governs the determination of whether an employment relationship exists. See Zheng v. Liberty Apparel Co., 355 F.3d 61, 66 (2d Cir. 2003). Here, the Corporate Defendants "shared Plaintiffs, acted in the interest of each other with respect to employees, paid their employees by the same method, shared control over the employees, and are themselves under common control and management." (Am. Compl. ¶ 53.) These allegations sufficiently establish that the Corporate Defendants jointly employed plaintiffs. See 29 C.F.R. § 791.2(b); Teri v. Spinelli, 980 F. Supp. 2d 366, 373-77 (E.D.N.Y. Oct. 28, 2013). The Individual Defendants "own[] the corporate defendants, and manage[] and make all business decisions, including but not limited to, decisions of what salary the employees will receive and the number of hours the employees will work." (Id. ¶¶ 70-71.) Under these circumstances, I find that the Individual Defendants were also plaintiffs' joint employers. See Fermin v. Las Delicias Peruanas Rest., 93 F. Supp. 3d 19, 35-36 (E.D.N.Y. 2015) (discussing the "economic reality" tests); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12-13 (2d Cir. 1984) (identifying factors sufficient to establish employer status).

2. Interstate Commerce

An enterprise that is "engaged in commerce or in the production of goods for commerce" can be subject to liability under the FLSA. See 29 U.S.C. §§ 206(a), 207(a)(1). Section 203(s)(1) sets forth the applicable statutory definition. See 29 U.S.C. § 203(s)(1). Here, "at all relevant times, Defendants [] had gross revenues in excess of $500,000." (Am. Compl. ¶ 76.) Though not specifically addressed in the amended complaint, it is reasonable to infer that some of the materials used by plaintiffs originated out of state, or that defendants' costumes were sold out of state. See Fermin, 93 F. Supp. 3d at 33; Huerta v. Victoria Bakery, No. 10 CV 4754, 2012 WL 1107655, at *2 (E.D.N.Y. Mar. 20, 2012). Therefore, I find that plaintiffs have alleged viable claims pursuant to the FLSA.

3. NYLL

The NYLL "mirrors the FLSA in most aspects, including its wage and overtime compensation provisions." Jemine, 901 F. Supp. 2d at 375. Accordingly, I find that plaintiffs have established defendants' liability under the NYLL's minimum wage and overtime compensation provisions.

Plaintiffs also seek unpaid spread-of-hours premiums. (Am. Compl. ¶ 94.) Under the NYLL, an employee is entitled to recover compensation for an extra hour of work at the minimum wage for each day that the employee worked in excess of ten hours. N.Y. COMP. CODES R. & REGS. tit. 12 § 142-24. Based on the hearing record, I find this claim viable only with respect to plaintiff Tax, whose workday was eleven hours. (See Hr'g Tr. at 26.)

Finally, plaintiffs allege that defendants failed to provide "any document or written statement accurately accounting for their hours worked, and setting forth their hourly rate of pay, regular wage, and/or overtime wages." (Am. Compl. ¶ 63.) Section 195(1)(a) of the NYLL, which took effect on April 9, 2011, required employers to provide all employees "at the time of hiring" and "on or before February first of each subsequent year of the employee's employment," with a written notice containing, inter alia, information about pay rate, designated payday, and the employer's contact information.[4] N.Y. LAB. LAW § 195(1)(a). Section 195(3) of the NYLL requires an employer to "furnish each employee with a statement with every payment of wages," detailing, inter alia, the hours compensated, the rate of pay, and the employer's contact information. See N.Y. LAB. LAW § 195(3). For the reasons discussed below, I find that plaintiffs cannot recover on the section 195(1)(a) claims, but that they have established liability on their section 195(3) claims. (See infra at 18.)

C. Damages

1. Statute of Limitations

Under the FLSA, plaintiffs may recover unpaid wages within two years after the cause of action accrued, unless the employer's violation was willful. See 29 U.S.C. § 255(a). If the violation was willful, then plaintiffs' recovery period is extended to three years. Id. Plaintiffs allege that defendants willfully violated the FLSA (see Am. Compl. ¶¶ 66-69), and defendants are in default. Under these circumstances, I respectfully recommend that the three-

[4] Section 195(1)(a) was amended, effective February 27, 2015, to no longer require such a notice on or before February first of each subsequent year of the employee's employment. See N.Y. LAB. LAW § 195(1)(a).

year recovery period apply. See Gunawan, 897 F. Supp. 2d at 87; Santillan v. Henao, 822 F. Supp. 2d 284, 297 (E.D.N.Y. 2011).

Zurita filed the Amended Complaint on August 5, 2013. Tax filed an opt-in consent form on August 26, 2013. (Consent, filed Aug. 26, 2013.) She, along with Hernandez, then became a named plaintiff by virtue of the January 29, 2014 amended complaint. Under such circumstances, I find that Zurita is entitled to recover under the FLSA forward from August 5, 2010, three years before he commenced the action. I find that Tax is entitled to recover under the FLSA forward from August 26, 2010, three years before she filed an opt-in consent. See 29 U.S.C. § 256; Morales v. B&M Gen. Renovation Inc., No. 14 CV 7290, 2016 WL 1266624, at *4 (E.D.N.Y. Mar. 9, 2016), adopted by 2016 WL 1258482 (E.D.N.Y. Mar. 29, 2016); Charvac v. M & T Project Managers of N.Y., Inc., No. 12 CV 5637, 2015 WL 5475531, at *4 (E.D.N.Y. June 17, 2015), adopted in pertinent part by 2015 WL 5518348 (E.D.N.Y. Sep. 17, 2015). Similarly, I find that Hernandez is entitled to recover under the FLSA forward from January 29, 2011, three years before the date that she filed her opt-in consent and simultaneously became a named plaintiff.

However, plaintiffs' NYLL claims are subject to a six-year recovery period. N.Y. LAB. LAW § 663(3). Under the circumstances of this action, which Zurita commenced individually and on behalf of similarly situated employees, I deem Tax's and Hernandez's NYLL claims to relate back to the filing of the original complaint pursuant to FED. R. CIV. P 15(c)(1). See Charvac, 2015 WL 5475531, at *4 (finding relation back appropriate where "the additional plaintiffs assert the same NYLL claims alleged in the original complaint" and the complaint was brought as a putative collective action); Lopez v. Setauket Car Wash & Detail Ctr., No. 12 CV 6324, 2015 WL 136336, at *3 (E.D.N.Y. Jan. 7, 2015) (finding relation back of

NYLL claims appropriate where, inter alia, "Defendants have [] been fully apprised of the nature of these claims.") Therefore, I find that all plaintiffs may recover under the NYLL forward from August 5, 2007.

2. Recoverable Damages

Employers who violate the minimum wage and overtime provisions of the FLSA are liable to an affected employee, inter alia, in the amount of the unpaid wages and overtime compensation. See 29 U.S.C. § 216(b). In this respect, the NYLL mirrors the FLSA. See N.Y. LAB. LAW § 663(1). Liquidated damage awards are also available under both statutes, see 29 U.S.C. § 216(b); N.Y. LAB. LAW § 663(1); however, plaintiffs solely request a liquidated damage award under the NYLL. (Proposed Findings of Fact & Conclusions of Law, dated Jan. 11, 2016 ("Pls.' Mem."), at 6.)

"Generally, an employee-plaintiff under the FLSA 'has the burden of proving that he performed work for which he was not properly compensated.'" Santillan, 822 F. Supp. 2d at 293-94 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)). However, under federal and state law the employer bears the burden of producing and maintaining records of employee "wages, hours, and other conditions and practices of employment." 29 U.S.C. § 211(c); see N.Y. LAB. LAW § 196-a(a). Defendants' conduct in this action has deprived plaintiffs of access to such records and hindered plaintiffs' ability to prove damages.[5] Under these circumstances, I credit plaintiffs' recollection and estimates regarding their employment, which are uncontested. See Gunawan, 897 F. Supp. 2d at 88; Santillan, 822

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[5] Plaintiffs allege that "Defendants have failed to make, keep and preserve records . . . sufficient to determine the wages, hours, and other conditions and practices of employment." (Am. Compl. ¶ 84); see 29 U.S.C. § 211(c). Additionally, although defendants appeared in the action, they failed to provide discovery. (See Order, dated Mar. 24, 2015).

F. Supp. 2d at 294; Rodriguez v. Almighty Cleaning, Inc., 784 F. Supp. 2d 114, 126 (E.D.N.Y. 2011).

3. Unpaid Wages

Where a plaintiff is entitled to damages under both federal and state law, the federal minimum wage does not preempt the state minimum wage and a plaintiff may recover under whichever statute provides the highest measure of damages. Gunawan, 897 F. Supp. 2d at 89. From August 5, 2007 to July 23, 2009, the New York State minimum wage was $7.15. N.Y. COMP. CODES R. & REGS. tit. 12 § 142-2.1(a)(1). From July 24, 2009 through December 20, 2013, the New York State minimum wage and the federal minimum wage were both $7.25. N.Y. COMP. CODES R. & REGS. tit. 12 § 142-2.1(a)(2); 29 U.S.C. § 206(1)(C).

a. Zurita

Plaintiff Hernandez, who is Zurita's wife and co-worker, testified regarding, inter alia, Zurita's wages, hours, and dates of employment. (See Hr'g Tr. at 19-22.) Based on this hearing record, I find that Zurita was employed by defendants from 2002 to June 15, 2013.[6] (Id. at 20.) I also find that Zurita worked for nine and one-half hours each day, six days a week, totaling fifty-seven hours of work each week, and that he was paid a weekly salary of $371 throughout his employment. (Id. at 20-22.)

In order to calculate the unpaid wages due to Zurita, I must first determine his regular hourly rate. "If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay . . . is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113; see Chopen v. Olive Vine, Inc., No. 12 CV 2269, 2015 WL 1514390, at *6 (E.D.N.Y. Mar. 13, 2015), adopted in pertinent part by 2015 WL 1542082 (E.D.N.Y. Mar 31, 2015); Santillan, 822 F. Supp. 2d at 295. The regular hourly rate "must be drawn from what happens under the employment contract." 29 C.F.R. § 778.108. '"In the absence of any written instrument memorializing the parties' intentions, the Court must infer the terms of their agreement from the entire course of their conduct, based on the testimonial and documentary evidence in the record.'" Chopen, 2015 WL 1514390, at *6 (quoting Moon v. Kwon, 248 F. Supp. 2d 201, 206 (S.D.N.Y. 2002)).

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[6] Hernandez's testimony was based on her personal observation. (Hr'g Tr. at 21-22); see Sec'y of Labor v. DeSisto, 929 F.2d 789, 792-94 (1st Cir. 1991) ("It is well established that not all employees need to testify in order to prove the violations or recoup back wages . . . [A]t a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the [job] categories is essential to support a back pay award."); see also Reich v. S. New England Telecomms. Corp., 121 F.3d 58, 67 (2d Cir. 1997) (quoting DeSisto).

Plaintiffs' calculations rely on an assumption that Zurita's weekly salary of $371 was intended as straight time pay only for the first 40 hours that he worked. (See Declaration of Peter Cooper, Esq., dated Jan. 11, 2016 ("Cooper Decl."), Ex. A.) In other words, plaintiffs adopt the position that Zurita's regular hourly rate was $9.28 ($371 / 40) and that his overtime rate was $13.92 ($9.28 x 1.5). Plaintiffs provide no support for this position. Nor do I find evidence in the record suggesting that Zurita's weekly salary was intended to compensate him just for the first forty hours that he worked. Under these circumstances, I find that Zurita's regular hourly rate was $6.51 ($371 / 57), below the statutory minimum. I therefore calculate an award of unpaid minimum wages, and calculate the overtime rate based on one-half of the applicable minimum wage rate.

Specifically, to determine the award of unpaid minimum wages, I multiply the total number of hours worked each week (fifty-seven) by the statutory minimum, $7.15 or $7.25. I then subtract Zurita's weekly salary of $371 and multiply the difference by the number of weeks in each pay period, taking into account a deduction for defendants' partial payment.[7] To determine the overtime award, I multiply the number of overtime hours each week (seventeen) by one-half of the statutory minimum, $3.58 or $3.63. I then multiply the sum by the number of weeks in each pay period. Based on my calculations, illustrated below, I respectfully recommend that Zurita be awarded $9,841.40 in unpaid minimum wages and $18,795.71 in unpaid overtime compensation.

Pay Period	**No. of Weeks**[8]	**Hours/ Week**	**Actual Pay/ Week**	**Lawful Pay/ Week**	**Minimum Wage Underpayment**
8/5/07 to 7/23/09	103	57	$371	$407.55	$3,764.65
7/24/09 to 4/8/11	89	57	$371	$413.25	$3,760.25
4/9/11[9] to 6/15/13	114	57	$371	$413.25	$4,816.50
Set-Off for Partial Payment Received					-$2,500
					TOTAL $9,841.40

[7] Pursuant to a settlement agreement that defendants did not fully satisfy, defendants made a $10,000 partial payment, which was distributed to plaintiffs. (See Pls.' Mem. at 9.) Zurita received $2,500, Tax $3,000, Hernandez $1,000, and plaintiffs' counsel $3,500. (Id.) Plaintiffs request that these distributions be deducted from each plaintiff's damage award, although it is unclear by what method. (See id.) I find it appropriate to deduct the amount that each plaintiff received from their respective unpaid minimum wage award.

[8] I have rounded the number of weeks in each pay period. For example, there are 102 weeks and five days from August 5, 2007 to July 23, 2009. I calculate this as 103 weeks.

[9] April 9, 2011 is the date that the NYLL's amended liquidated damages provision took effect, thereby affecting the court's liquidated damages calculations. See N.Y. LAB. LAW § 663(1).

Pay Period	**No. of Weeks**	**OT Hours/ Week**	**Lawful OT Rate/ Week**	**OT Underpayment**
8/5/07 to 7/23/09	103	17	$60.86	$6,268.58
7/24/09 to 4/8/11	89	17	$61.71	$5,492.19
4/9/11 to 6/15/13	114	17	$61.71	$7,034.94
				TOTAL $18,795.71

b. Tax

Plaintiff Tax testified regarding, inter alia, her wages, hours, and dates of employment. (See Hr'g Tr. at 23-29.) Based on this hearing record, I find that Tax was employed by defendants from 2002 to June 15, 2013.[10] (Id. at 24.) I also find that she worked for ten and a half hours each day, seven days a week, totaling 73.5 hours each week, and that she received a weekly wage of $271. (Id. at 26, 29.)

Plaintiffs' calculations for Tax also rely on an assumption that her weekly wages were intended as straight time pay just for the first 40 hours that she worked. (See Cooper Decl., Ex. B.) As discussed, I find no support in the record for this position. Instead, I find that Tax's regular hourly rate was $3.69 ($271 / 73.5), below the statutory minimum. She is therefore entitled to unpaid minimum wages and overtime compensation based on one-half of the applicable minimum wage rate.

Specifically, I calculate Tax's minimum wage award by multiplying the statutory minimum, $7.15 or $7.25, by the total number of hours she worked each week (73.5). I then subtract Tax's actual weekly wage, $271, and multiply the difference by the number of weeks in

[10] Plaintiff Tax testified that she left her employment in June 2013. (Hr'g Tr. at 24.) Plaintiffs construe this as June 15, 2013, which I find reasonable.

each pay period. As to the overtime award, I multiply one-half of the minimum wage rate, $3.58 or $3.63, by the overtime hours worked each week (33.5). I then multiply this sum by the number of weeks in each pay period.

Additionally, because Tax's workday spanned eleven hours, seven days a week, she is entitled to unpaid NYLL spread-of-hours premiums. To calculate this award, I multiply the applicable minimum wage rate by the number of days in each pay period. Based on my calculations, illustrated below, I respectfully recommend that Tax be awarded $76,378.23 in unpaid minimum wages, $37,039.62 in unpaid overtime compensation, and $15,457.60 in unpaid spread-of-hours premiums.

Pay Period	**No. of Weeks**	**Hours/ Week**	**Actual Pay/ Week**	**Lawful Pay/ Week**	**Minimum Wage Underpayment**
8/5/07 to 7/23/09	103	73.5	$271	$525.53	$26,216.59
7/24/09 to 8/25/10	57	73.5	$271	$532.88	$14,927.16
8/26/10 to 4/8/11	32	73.5	$271	$532.88	$8,380.16
4/9/11 to 6/15/13	114	73.5	$271	$532.88	$29,854.32
Set-Off for Partial Payment Received					-$3,000
					TOTAL $76,378.23

Pay Period	No. of Weeks	OT Hours/ Week	Lawful OT Rate/ Week	OT Underpayment
8/5/07 to 7/23/09	103	33.5	$119.93	$12,352.79
7/24/09 to 8/25/10	57	33.5	$121.61	$6,931.77
8/26/10 to 4/8/11	32	33.5	$121.61	$3,891.52
4/9/11 to 6/15/13	114	33.5	$121.61	$13,863.54
				TOTAL $37,039.62

Pay Period	Days	Minimum Wage	Spread-of-Hours Underpayment
8/5/07 to 7/23/09	719	$7.15	$5,140.85
7/24/09 to 8/25/10	398	$7.25	$2,885.50
8/26/10 to 4/8/11	226	$7.25	$1,638.50
4/9/11 to 6/15/13	799	$7.25	$5,792.75
			Total $15,457.60

c. Hernandez

Plaintiff Hernandez testified with respect to her wages, hours, and dates of employment. (See Hr'g Tr. at 7-19.) Based on this hearing record, I find that Hernandez was employed by defendants from 2002 to December 20, 2013. (Id. at 8.) I also find that Hernandez worked thirty hours each week, receiving weekly wages of $120. (Id. at 9, 19.) This amounts to a regular rate of $4.00 an hour. Based on my calculations, illustrated below, I respectfully recommend that Hernandez be awarded $31,158.50 in unpaid minimum wages.[11]

Pay Period	**No. of Weeks**	**Hours/ Week**	**Actual Pay/ Week**	**Lawful Pay/ Week**	**Minimum Wage Underpayment**
8/5/07 to 7/23/09	103	30	$120	$214.50	$9,733.50
7/24/09 to 1/28/11	79	30	$120	$217.50	$7702.50
1/29/11 to 4/8/11	10	30	$120	$217.50	$975
4/9/11 to 12/20/13	141	30	$120	$217.50	$13,747.50
Set-Off for Partial Payment					-$1,000
					TOTAL $31,158.50

4. Liquidated Damages

As noted, plaintiffs seek liquidated damages solely under the NYLL. (See Pls.' Mem. at 6.) Before November 24, 2009, section 663 of the NYLL provided for an award of liquidated damages if the employer's underpayment was "willful." N.Y. LAB. LAW § 663(1). By amendment effective November 24, 2009, this section was revised to provide for an award of liquidated damages "unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law." Id. Plaintiffs allege that defendants' NYLL violations were willful (see Am. Compl. ¶¶ 92-95), and, as defendants have defaulted, they are not entitled to a finding of good faith. See Jaramillo v. Banana King Rest. Corp., No. 12 CV 5649, 2014 WL 2993450, at *5 (E.D.N.Y. July 2, 2014); Santillan, 822 F. Supp. 2d at

[11] I use the previously explained method to calculate Hernandez's unpaid minimum wage award.

297; Jemine, 901 F. Supp. 2d at 388. Under these circumstances, I respectfully recommend an award of liquidated damages under the NYLL.

Prior to April 9, 2011, the NYLL provided for liquidated damages in an amount equal to "twenty five percent of the total of such underpayments found to be due." N.Y. LAB. LAW § 663(1). By amendment effective April 9, 2011, the section was revised to provide for liquidated damages equal to "one hundred percent of the total of such underpayments found to be due." Id. Based on my calculations, illustrated below, I respectfully recommend that Zurita be awarded $14,172.86 in NYLL liquidated damages, that Tax be awarded $67,101.82, and that Hernandez be awarded $17,350.25.

	Unpaid Minimum and Overtime Wages + Spread of Hours Pay	Liquidated Damages Award Rate	Liquidated Damages Award
Zurita (6/15/07 to 4/8/11)	$19,285.67	25%	$4,821.42
Zurita (4/9/11 to 6/15/13)	$9,351.44	100%	$9,351.44
			Total $14,172.86
Tax (6/15/07 to 4/8/11)	$82,364.84	25%	$20,591.21
Tax (4/9/11 to 6/15/13)	$46,510.61	100%	$46,510.61
			Total $67,101.82
Hernandez (6/15/07 to 4/8/11)	$18,411	25%	$4,602.75
Hernandez (4/9/11 to 12/20/13)	$12,747.50	100%	$12,747.50
			Total $17,350.25

5. Wage Notice and Wage Statement Violation Penalties

Plaintiffs further seek damages for defendants' violations of NYLL sections 195(1)(a) and 195(3), setting forth the employer's wage notice and wage statement obligations. (See Pls.' Mem. at 1-2.) Section 195(1)(a) of the NYLL, which took effect on April 9, 2011, required employers to provide all employees "at the time of hiring" and "on or before February first of each subsequent year of the employee's employment," with a written notice containing, inter alia, information about pay rate, designated payday, and the employer's contact information. See N.Y. LAB. LAW § 195(1)(a). Section 198(1-b) of the NYLL provides that "[i]f any employee is not provided within ten business days of his or her first day of employment a notice as required by [section 195(1)], he or she may recover . . . damages of fifty dollars for each workweek that the violations occurred or continue to occur, but not to exceed a total of two thousand five hundred dollars . . . ."[12] N.Y. LAB. LAW § 198(1-b).

By its plain language, "[t]his subsection [] does not extend this private right of action to employees who do not receive subsequent notices on or before February first." Guaman v. Krill Contracting, Inc., No. 14 CV 4242, 2015 WL 3620364, at *8 (E.D.N.Y. June 9, 2015) (citing Guan Ming Ling v. Benihana New York Corp., No. 10 CV 1335, 2012 WL 7620734, at *8 (S.D.N.Y. Oct. 23, 2012)). Here, each plaintiff was hired before the statute took effect, such that defendants' only violation could have been a failure to provide a notice on or before February first. Therefore, I respectfully recommend that there be no damage award for the wage notice violations.

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[12] Section 198(1-b) was amended, effective February 27, 2015, to provide for "damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars . . . ." N.Y. LAB. LAW § 198(1-b). Because this change did not go into effect until February 27, 2015, the court applies the statutory fine that governed during plaintiffs' employment.

Section 198(1-d) of the NYLL addresses remedies for violations of section 195(3). Under section 198(1-d), employees who did not receive a statement required by section 195(3) with each payment of wages that occurred on or after April 9, 2011 may recover one hundred dollars in damages for each week that the violation occurs, up to a statutory maximum of $2,500.[13] N.Y. LAB. LAW § 198(1-d). Here, each plaintiff worked for defendants for more than twenty-five weeks after April 9, 2011. Accordingly, I respectfully recommend that each plaintiff be awarded the statutory maximum of $2,500 for defendants' wage statement violations.

6. Total Damages Summary

	Zurita	**Tax**	**Hernandez**
Unpaid Minimum Wages	$9,841.40	$76,378.23	$31,158.50
Unpaid Overtime Compensation	$18,795.71	$37,039.62	n/a
Unpaid Spread-of-Hours Premiums	n/a	$15,457.60	n/a
Total Compensatory Damages	$28,637.11	$128,875.45	$31,158.50
Liquidated Damages	$14,172.86	$67,101.82	$17,350.25
Wage Statement Penalties	$2,500	$2,500	$2,500
Total Damages Award	$45,309.97	$198,477.27	$51,008.75

[13] Section 198(1-d) was amended, effective February 27, 2015, to provide for damages of "two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not exceed a total of five thousand dollars." N.Y. LAB. LAW § 198(1-d). Because this change did not go into effect until February 27, 2015, the court applies the statutory fine that governed during plaintiffs' employment.

7. Pre-judgment Interest

Plaintiffs are also entitled to pre-judgment interest under the NYLL. The Second Circuit has held that "'pre-judgment interest and liquidated damages under the NYLL are not functional equivalents' because liquidated damages awarded pursuant to the NYLL are punitive in nature." Jaramillo, 2014 WL 2993450, at *7 (quoting D'Arpa v. Runway Towing Corp., No. 12 CV 1120, 2013 WL 3010810, at *26 (E.D.N.Y. June 18, 2013)) (internal brackets removed); see also Fermin, 93 F. Supp. 3d at 48 ("In contrast to the FLSA, the NYLL permits an award of both liquidated damages and pre-judgment interest.") '"Prejudgment interest is calculated on the unpaid wages due under the NYLL, not on the liquidated damages awarded under the state law.'" Fermin, 93 F. Supp. 3d at 49 (quoting Mejia v. East Manor USA Inc., No. 10 CV 4313, 2013 WL 3023505, at *8 n.11 (E.D.N.Y. Apr. 19, 2013), adopted by 2013 WL 2152176 (May 17, 2013)) (internal brackets removed).

The statutory rate of interest is nine percent per annum. N.Y. C.P.L.R. § 5004. Where damages were incurred at various times, interest may be calculated from a single reasonable intermediate date. N.Y. C.P.L.R. § 5001(b). The midpoint of a plaintiff's employment is a reasonable intermediate date for purposes of calculating prejudgment interest. See Jaramillo, 2014 WL 2993450, at *8; Fermin, 93 F. Supp. 3d at 49. I determine the midpoint of Zurita's and Tax's employment to be July 10, 2010. I determine the midpoint of Hernandez's employment to be November 17, 2010. Accordingly, I respectfully recommend that Zurita be awarded pre-judgment interest on his compensatory damages of $28,637.11, calculated at a rate of nine percent per annum from July 10, 2010 to the date that judgment is entered. I recommend that Tax be awarded pre-judgment interest on her compensatory damages of $128,875.45, calculated at a rate of nine percent per annum from July 10, 2010 to the date on which judgment is entered. Finally, I recommend that Hernandez be awarded pre-judgment interest on her compensatory damages of $31,158.50, calculated at a rate of nine percent per annum from November 17, 2010 to the date that judgment is entered.

8. Post-judgment Interest

Plaintiffs further request an award of post-judgment interest. (See Am. Compl. at 18.) 28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). Under the statute, interest is calculated "from the date of the entry of judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment" 28 U.S.C. § 1961(a). Thus, I respectfully recommend that plaintiffs be awarded statutory post-judgment interest. See Morales, 2016 WL 1266624, at *10 (awarding post-judgment interest pursuant to 28 U.S.C. § 1961); Fermin, 93 F. Supp. 3d at 53 (finding that post-judgment interest is mandatory).

9. Attorney's Fees & Costs

Plaintiffs seek an award of $21,210 in attorney's fees and $581 in costs. (Contemporaneous Time Records, annexed to Cooper Decl. as Ex. D ("Time Rs.").) The FLSA and the NYLL each provide for the recovery of reasonable attorney's fees and costs. See 29 U.S.C. § 216(b); N.Y. LAB. LAW § 663(1).

a. Fees

In calculating a fee award, the court must first establish a reasonable hourly rate, which is "what a reasonable, paying client would be willing to pay." Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 184 (2d Cir. 2008). "The reasonable hourly rates should be based on "rates prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." Cruz v. Local Union No. 3 of IBEW, 34 F.3d 1148, 1159 (2d Cir. 1994) (citing Blum v. Stenson, 465 U.S. 886, 894 (1984)). "Court have broad discretion to assess the reasonableness of each component of a fee award." Jaramillo, 2014 WL 2993450, at *8 (citing Siemieniewicz v. CAZ Contracting Corp., No. 11 CV 704, 2012 WL 5183375, at *15 (E.D.N.Y. Sep. 21, 2012), adopted as modified by 2012 WL 5183000 (E.D.N.Y. Oct. 18, 2012)).

Plaintiffs request an hourly rate of $400 for attorney Peter Cooper. (See Pls.' Mem. at 8.) Mr. Cooper, admitted in 1997, is an experienced litigator and partner at the firm of Cilenti & Cooper, PLLC, which specializes in employment law. (Id.) Nonetheless, based on my review of the hourly rates awarded to experienced attorneys in wage and hour cases in this district, I find it appropriate to reduce Mr. Cooper's hourly rate to $350. See, e.g., Perez v. Queens Boro Yang Cleaner, Inc., No. 14 CV 7310, 2016 WL 1359218, at *8 (E.D.N.Y. Mar. 17, 2016), adopted by 2016 WL 1337310 (Apr. 5, 2016) (reducing partner's hourly rate to $350); Dominguez v. B S Supermarket, Inc., No. 13 CV 7247, 2015 WL 1439880, at *15 (E.D.N.Y. Mar. 27, 2015) (awarding partner $350 hourly rate); Hernandez v. Prof'l Maint. & Cleaning Contractors Inc., No. 13 CV 2875, 2015 WL 128020, at *8 (E.D.N.Y. Jan. 8, 2015) (finding that "judges in the Eastern District have awarded fees in the range of $300-$400" and reducing attorney's rate to $350 an hour). Plaintiffs further request an hourly rate of $100 for paralegals Jenett Pena and Tatiana Castillo. (Pls.' Mem. at 8.) I find it appropriate to reduce this hourly rate to $75. See Morales, 2016 WL 1266624, at *11 (awarding paralegal $75 hourly rate); Cortes v. Warb Corp., No. 14 CV 7562, 2016 WL 1266596, at *6 (E.D.N.Y. Mar. 15, 2016), adopted by 2016 WL 1258484 (E.D.N.Y. Mar. 30, 2016) (same); Perez, 2016 WL 1359218, at *8 (reducing paralegal's rate to $75 an hour).

b. Hours

Plaintiffs' fee application is based on 56.25 total hours of work, consisting of 53.95 hours expended by counsel and 2.3 hours expended by the paralegals.[14] (See Time Rs.) A fee applicant bears the burden of supporting its claim of hours expended by accurate, detailed and contemporaneous time records. See Santillan, 822 F. Supp. 2d at 299; New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983). The court must assess whether the hours expended by plaintiff's counsel were reasonable, and exclude any hours that were excessive, redundant, or otherwise unnecessary to the litigation. See Jaramillo, 2014 WL 2993450, at *9; Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Undoubtedly, 56.25 hours is a high expenditure of time for an FLSA action in a default posture. See Cortes, 2016 WL 1266596, at *6 ("Generally, the high-end amount of hours spent on [c]ases in a similar procedural posture … is no more than 55 hours total.") Here, however, the court takes into account the extensive delays occasioned by defendants' non-compliance and the additional work this necessitated for plaintiffs' counsel.[15] Under these unique circumstances, and having reviewed the billing records of Mr. Cooper, I find that 56.25 hours reflects a reasonable expenditure of time. Accordingly, I credit 53.95 hours of attorney work at a rate of $350 an hour, and 2.3 hours of paralegal work at a rate of $75 an hour. I then deduct $3,500 from the fee award, as plaintiffs' counsel has received this amount as his portion of defendants' partial payment. I therefore respectfully recommend that plaintiffs be jointly awarded $15,555 in attorney's fees.

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[14] I note that applying the rates requested to the hours expended amounts to a fee in excess of the $21,210 sought.

[15] Defendants, inter alia, did not provide discovery, despite agreeing to a disclosure schedule; did not participate in mediation, despite agreeing to do so; and agreed to settlement terms that they did not satisfy. (See Minute Entry, dated Jan 27, 2014; Order to Show Cause, dated Apr. 3, 2014; Order, dated Mar. 24, 2015.)

c. Costs

Finally, plaintiffs request $581 in costs, consisting of $400 in filing fees and $181 in process server fees. (See Time Rs.) "[O]nly those costs that are tied to identifiable, out-of-pocket disbursements are recoverable." Jemine, 901 F. Supp. 2d at 393 (internal quotation marks and citation omitted). As court filing and service of process fees are routinely recoverable, I recommend awarding plaintiffs costs in the amount requested.

CONCLUSION

For the reasons set forth above, I respectfully recommend that the Clerk of the Court be directed to enter a notation of defendants' default, and that plaintiffs' motion for default judgment be granted. With regard to damages, I recommend that Zurita be awarded $45,309.97, representing $9,841.40 in unpaid minimum wages, $18,795.71 in unpaid overtime compensation, $14,172.86 in NYLL liquidated damages, and $2,500 for defendants' wage statement violations. I further recommend that Zurita be awarded pre-judgment interest at a rate of nine percent per annum on his compensatory damages of $28,637.11, accruing from July 10, 2010 to the date that judgment is entered. As to Tax, I respectfully recommend an award of $198,477.27, representing $76,378.23 in unpaid minimum wages, $37,039.62 in unpaid overtime compensation, $15,457.60 in unpaid spread-of-hours premiums, $67,101.82 in NYLL liquidated damages, and $2,500 for defendants' failure to provide wage statements. I further recommend that Tax be awarded pre-judgment interest at a rate of nine percent per annum on her compensatory damages of $128,875.45, accruing from July 10, 2010 to the date on which judgment is entered. As to Hernandez, I recommend an award of $51,008.75, representing $31,158.50 in unpaid minimum wages, $17,350.25 in NYLL liquidated damages, and $2,500 for defendants' wage statement violations. I further recommend an award of pre-judgment interest at a rate of nine percent per annum on her compensatory damages of $31,158.50, accruing from November 17, 2010 to the date that judgment is entered. Finally, I recommend that plaintiffs be awarded post-judgment interest and jointly awarded $15,555 in attorney's fees and $581 in costs.

Plaintiffs' counsel is directed to serve copies of this Report and Recommendation on defendants. Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with courtesy copies to Judge Amon and to my chambers, within fourteen (14) days. Failure to file objections within the specified time waives the right to appeal the district court's order. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Respectfully submitted,

S/Robert M. Levy

ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
June 9, 2016